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No. 334

IN THE

SUPREME COURT

OF THE

United States

October Term, 1957

No. 1

MAURICE PENN,

Petitioner,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of L. R. MAHAN, also known as LEMUEL ROSS MAHAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH W. FAIRFIELD
ETHELYN F. BLACK
JEROME A. REINER
Counsel for Petitioner.

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IN THE

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MAURICE PENN.

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vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of L. R. MAHAN, also known as LEMUEL ROSS MAHAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Maurice Penn, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on the 8th day of May, 1957.

Opinions Below

The Opinion of the Court of Appeals is reported verbatim herein (Appendix A; pages 59 to 60). It is officially reported in 244 F. 2d 309.

Jurisdiction

The judgment of the Court of Appeals was entered on May 8, 1957 (Appendix A, page 61). A petition for rehearing was denied on June 17th, 1957. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. sec. 1254 (1).

Questions Presented

The sole question presented to this Court for determination is the power of a Referee in Bankruptcy to disregard the evidence and determine an issue of fact without resorting to the evidence. Indirectly involved in this question, and one in which there is no Supreme Court decision, and few decisions from intermediate appellate courts, is the method of evaluating a chose in action as an asset in a bankrupt estate.

Statutes Involved

The only statute involved is Sec. 67 a of the Bankruptcy Act (11 U.S.C.A. 107), the pertinent portion of which is as follows:

> "*Liens and fraudulent transfers* (a) (1) every lien against the property of a person obtained by attachment, judgment, levy or other legal or equi-

table process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or . . ."

Statement of the Case

The facts involved are as follows:

The Petitioner herein, Maurice Penn, caused an attachment to be levied in Municipal Court Case No. 124,775 entitled Maurice Penn v. L. R. Mahan, on certain real property described as Lot 28, Tract 8790, as per map recorded in Book 117, pages 43-44 of Maps, Records of Los Angeles County, State of California (Finding of Fact No. II, Tr. of Rec. p. 23). An order adjudicating L. R. Mahan as a bankrupt was entered on or about the 16th day of October, 1953 (Finding of Fact No. I; Tr. of Rec. p. 23; pp. 7-8). On the 7th day of December, 1955, the trustee filed its petition alleging that at the time of the said levy of attachment the bankrupt was actually insolvent and that by virtue of the provisions of §67a [11 U.S.C.A. 107] of the Bankruptcy Act said levy of attachment and subsequent judgment lien were void and of no effect as against either the trustee in bankruptcy or the bankrupt estate (Tr. of Rec. pp. 17-18) which allegation was duly denied by the respondent in its Answer to the Petition (Tr. of Rec. p. 19). The issues thus being framed the sole question posed to the court was the insolvency of the bankrupt at the time of the levy of the attachment (Tr. of Rec. p. 29).

In determining the solvency of the bankrupt on the 16th day of September, 1953, consideration must be given to whether the chose in action in the sum of $81,719.61 was worth that amount.

The trustee then produced as a witness Grace Mahan, the wife of the bankrupt (Tr. of Rec. p. 29) who testified that a cause of action against the Seaboard Finance Company based on usury had been filed on September 16, 1953, claiming damages in the total amount of $81,719.61 (Tr. of Rec. p. 36; p. 42). The witness and her husband felt that the Seaboard Finance Company was indebted to them for that amount (Tr. of Rec. p. 42; p. 43). This was the only testimony produced by the trustee to support his allegation that the bankrupt was insolvent at the time of the levy of the attachment. The only other evidence in the record relating to the value of this chose in action was the schedules (Tr. of Rec. pp. 5-7) verified by the bankrupt as part of an accurate inventory of his property (Tr. of Rec. p. 4, Paragraph IV).

From all of this the Referee found that the alleged claim for usury in the sum of $81,719.61 was inchoate and uncertain in character and amount and had no appreciable value and concluded that the bankrupts were actually insolvent under the provisions of §67a of the Bankruptcy Act and voided the attachment and the subsequent judgment lien (Tr. of Rec. pp. 24, 25).

Petitioner's Position

It is the position of the petitioner, that upon evidence properly submitted, a Referee in Bankruptcy may evaluate a chose in action. In the case at bar the trustee in bankruptcy submitted evidence that the value of the chose in action was $81,719.61. If we concede that under the circumstances the Referee had the power to give this evidence no weight the result therefor is there was *no* evidence in the record as to the value of the chose in action. The Referee therefore had no evidence upon which he could determine its value. He could not call upon his experience as a means of determining the value of the chose in action.

Argument

Without any evidence whatsoever, the Referee in Bankruptcy is precluded from making any finding of fact.

The trustee contends that since this claim against Seaboard is a lawsuit, its value as an asset should be discounted (Tr. of Rec., p. 46). In thus arguing the trustee overlooks the fact that the burden of proof is upon him to establish that this claim has no value and not upon the petitioner to supply evidence as to the lawsuit's actual value. (*In re Graves,* 27 Fed. Supp. 717, 718; *Dockery v. Flanary,* (Sup. Ct. Va.) 73 S.E. 2d 375, 377; *Sample v. Jackson* (Sup. Ct. N.C.) 26 S.E. 2d 876, 879; *Moffit v. Dennitson,* (Sup. Ct. Iowa) 294 N.W. 731, 734).

The argument of the trustee that until a judgment has been rendered a cause of action has no value at all

and that the court can entirely disregard it (Tr. of Rec. p. 46) is, of course, not correct. A judgment is merely the judicial determination of a claim by a court upon a matter within its jurisdiction (*U.S. v. Hark,* 320 U.S. 531, 534; 64 S. Ct. 359, 361). It is a matter of common knowledge that not all judgments are reducible to cash. Equally well known is the axiom that a claim against a substantially solvent defendant has greater value than an uncollectable judgment.

In the case at bar the action had been pending prior to the levy of attachment (Tr. of Rec. p. 36). If at the date of the hearing, December 28, 1955, 2 years later (Tr. of Rec. p. 28) the litigation had not been tried and disposed of, the fault lies with the bankrupt and the trustee for not diligently prosecuting the same. No reason is given why those charged with pursuing the litigation did not do so with all haste and dispatch (Tr. of Rec. p. 47).

In determining the value of the chose in action we have only the testimony of Mrs. Mahan (Tr. of Rec. pp. 36, 42, 43) and the verified schedules that it was valued in the sum of $81,719.61 (Tr. of Rec. p. 7). (*In re Mandel,* 127 Fed. 863; affirmed 135 Fed. 1021). No testimony was introduced by the trustee as to any other valuation. The testimony of this witness is not so improbable that it cannot be accepted as evidence. In any event, it was uncontradicted and testimony not improbable and uncontradicted must be accepted as true by the court. (*Hynes v. White,* 47 Cal. App. 549, 552, [190 P. 836]; *Hutchison v. Holland,* 47 Cal. App.

710, 712, [190 P. 1072]; *Gomez v. Cecena,* 15 Cal. 2d 363, 366, [101 P. 2d 477]; *Mantonya v. Bratlie,* 33 Cal. 2d 120, 127, [199 P. 2d 677]; *Lee Sing Far v. U.S.,* 94 Fed. 834; Wigmore on Evidence, 2nd Edition, §2034. Under such circumstances the Court may not disregard such evidence. Furthermore there is *no* evidence upon which the referee could have made a contrary finding.

The cases cited by the Referee in its memorandum opinion (Tr. of Rec. p. 22) do not hold a contrary view, but actually support appellant's position that the *burden of proof* is upon the trustee to establish the value of a claim before the Referee can make a finding as to its worth.

In *First National Bank v. Wyoming Valley Ice Company* (Dist. Ct. Pa.) 136 Fed. 466, the respondent argued that certain bonds totaling $90,000.00 and set up as a liability were invalid; and that if you subtract this sum of $90,000.00 from the liabilities, the assets would exceed the liabilities and there would be no insolvency. The respondent insisted that these bonds were invalid because there was no compliance with certain state requirements. The court there held that the question of the irregularity was one that only the state authorities could take advantage of and as a result respondent failed to sustain the burden of proof that these bonds were invalid.

In *Houghton Wool Co. v. Morris,* (C.C.A. 1) 249 Fed. 434, the Referee found that the bankrupt was insolvent, the court saying on page 435:

"That there was sufficient evidence to support these findings is not disputed."

In Re Cooper, (Dist. Ct. Mass.) 12 Fed. 2d 485, involved a cause of action for breach of contract growing out of a transaction relating to reorganization of the bankrupt's business; that the agreement itself was for some indefinite undertaking to furnish financial assistance. In this case the bankrupt himself admitted that the claim was not seriously considered by him (pp. 485-486). The court there said on page 486:

"The test seems to be whether the claim is one that can be rendered available for the payment of debts within a reasonable time."

In the case at bar the only testimony is that Mrs. Mahan considered seriously this chose in action and felt that the Seaboard Finance Company was actually indebted to the bankrupt in the sum of $81,719.61 (Tr. of Rec. pp. 42-43). Moreover, it is because of the laches of the bankrupt and the trustee that this lawsuit was not tried long before the hearing of the petition. In the normal course of events the lawsuit would have been adjudicated and a determination had whether recovery on the claim would have rendered sufficient funds avaliable for the payment of debts. As a matter of equitable principles the trustee in bankruptcy should not be permitted to remain idle more than two years and then without producing any evidence whatsoever argue that a chose in action is valueless.

On Page 60 of Appendix A, this Court concluded that the finding of insolvency on the date of issue by the Referee was fully justified since the Referee stated that serious question existed as to whether the finance company is subject to the usury act, or is a personal loan company excluded therefrom, and also *whether the amount claimed is the correct amount,* (italics added). This Court also concluded that the weight to be given to this claim for usury (based on the testimony of Mrs. Mahan, wife of the bankrupt) was properly within the discretion of the Referee.

What this Court overlooked is that Mrs. Mahan was called as a witness by the trustee, and she was a witness for and on behalf of the trustee. Under those circumstances the trustee was bound by her testimony.

It is axiomatic that a party is bound by the testimony of his own witnesses (*Wright v. Gordon's Transport,* 162 Fed. 2d 590, 591). Put another way, it has been held that a litigant cannot challenge his own unimpeached witness (*Burdon v. Wood,* 142 Fed. 2d 303, 306; Certiorari denied, 323 U.S. 733, 65 Sup. Ct. 70; 89 L. Ed. 588). This rule applies even where the litigant is a *quasi* public official. For example, in *Bowles v. Marx Hide and Tallow Co.,* 153 Fed. 2d 146, 147, the Court held that an OPA Administrator vouches for the credibility of his own witness.

In Re Erickson, 13 Fed. Supp. 853, 855, the Court held that where

> "An objecting creditor presented the bankrupt as his witness, as his sole witness, and as a credible witness, and is bound by his testimony, and he cannot be impeached or assailed by the objecting creditor."

In *Wiget v. Becker,* 84 Fed. 2d 706, in reversing a judgment for the defendant, the Court held on page 710 as follows:

> "Ordinarily, a party is bound by the testimony of his own witnesses. *Yellow Cab v. Rodgers,* (C. C.A. 3) 61 Fed. (2d) 729. To be sure, the evidence might justify the argument that a witness was mistaken, and the trier of fact may so find, but there must be evidence of mistake. *Michigan Central R. Co. v. Zimmerman,* (C.C.A. 6) 24 Fed. (2d) 23. There is no contention that Mr. Kurtzeborn made any mistake in his testimony, or that the facts upon which counsel have apparently acted in making the statement and admission of record are not true."

Likewise in the case at bar, no question has been raised why the testimony of Mrs. Mahan as to the value of her claim should be disregarded. Since this is testimony offered by the trustee in behalf of its own case, there is no justification whatsoever, why this testimony should be disregarded.

If we assume, for the sake of argument, that the Referee was justified in giving no weight to the evidence of Mrs. Mahan, then it was still error to find the bankrupt insolvent on the date in issue (App. p. 60)

for in such event there is no testimony of any type as to the value of the chose in action. Bearing in mind that the trustee has the burden of proving the value of a chose in action for the purpose of sustaining his obligation that the bankrupt was insolvent, disregarding the testimony of Mrs. Mahan that the chose in action was valued at the sum of $81,719.61 *does not* establish that the value of the chose in action was that amount or any amount or entirely valueless, for mere disbelief of a witness does not establish an affirmative case (*Heise v. Earnshaw Publications,* 130 Fed. Supp. 38, 41).

In *Estate of Burlew,* 146 A.C.A. 695, the court said on pages 701, 702 as follows:

> "While her testimony could have been disbelieved, there was no other evidence to believe, and as is said in *Hutchinson v. Contractors' State etc. Board,* 143 Cal. App. 2d ....., ..., ... [300 P. 2d 216]: (Advance Report Citation: 143 A.C.A. 733, 737-738)
>
> 'But the rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. " 'Disbelief does not create affirmative evidence to the contrary of that which is discarded. " "The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (citing cases)." " . . .

> The fact that one testifies falsely may, and usually does, afford an inference that he or she is concealing the truth but it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.'" (citing cases)."

See also *Hutchinson v. Contractors State etc. Board*, 143 Cal. App. 2d 628; 300 P. 2d 216.

In *Barnett v. Terminal Railroad Assn. of St. Louis*, 228 Fed. 2d 756, 761, the court held that:

> "Where a party's own testimony, if true, would defeat his right to a verdict, and such statements are not modified or explained, a verdict may be directed against him."

In re Erickson, 13 Fed. Supp. 853, 855, the Court held:

> "Even so, there is no testimony in the case except that of the bankrupt and it is upon his testimony that reliance must be placed for decision here. The objecting creditor conducted the examination upon the apparent assumption that he was entitled to cross-examine and, if possible, impeach his own witness. A considerable part of the examination was conducted along this line and was not objected to, although objections, if made, would probably have been sustained by the referee. Examining the record in the light of the foregoing authorities, the report of the referee upon the facts and his recommendations cannot be sustained."

In *Controller of California v. Lockwood,* 193 Fed. 2d 169, this court in commenting upon the duties of a referee in bankruptcy to make findings upon evidence and not suspicion said as follows on page 172:

> "We agree with the District Court that there is no factual basis for the referee's conclusion. Suspicion, no matter how aroused, is not evidence. What we find here does not establish the fact in dispute. It lacks the quality of proof. The inference which the referee drew does not rest upon supporting fact or facts. His deduction does not come within the orbit of another certain truth. There are too many loopholes for a false deduction."

The point that petitioner has raised and which petitioner insists is error, is that even if the referee chose to disregard the testimony of the witness Mrs. Mahan as to the value of the chose in action, then there is no evidence in the record whatsoever as to any value which may be attributed to the chose in action. The referee did state

> "That serious questions existed as to whether the finance company is subject to the usury act or is a personal loan company excluded therefrom, *and also whether the amount claimed is the correct amount.*" (Italics added) (Op. p. 2)

But although the Referee may have decided to disregard the testimony of Mrs. Mahan and that the claim for usury in the sum of $81,719.61 was inchoate and

uncertain in character and amount, it is also equally true that there is no evidence as to what the actual value of the chose in action is, and the Referee under the circumstances had no basis in fact or otherwise to come to the conclusion that it was entirely valueless.

Conclusion

The ruling below raises the important question of the power of a referee in bankruptcy to render a decision without *any* evidence to support its conclusion. Petitioner concedes that if there is any evidence in the record, no matter how weak, to support the finding of the referee, the decision is not subject to attack, for no Court will engage in polemics as to what weight to accord evidence. But the situation in the case at bar raises the question as to the power of the referee to make a determination on a record barren of any evidence to support the decision. The Petition for a Writ of Certiorari should, therefore, be granted.

Respectfully submitted,

JOSEPH W. FAIRFIELD
ETHELYN F. BLACK
JEROME A. REINER
Counsel for Petitioner.

APPENDIX A
TRANSCRIPT OF RECORD

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. .....

MAURICE PENN,)
Petitioner,)
vs.)
WILLIAM R. GRANT, Trustee in)
Bankruptcy of L. R. MAHAN, Also)
Known as LEMUEL ROSS MAHAN,)
Respondent.)

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAURICE PENN,)
Appellant,)
vs.)
WILLIAM R. GRANT, Trustee in) No. 15176
Bankruptcy of L. R. MAHAN, Also)
Known as LEMUEL ROSS MAHAN,)
Appellee.)

Appeal from the United States District Court for the Southern District of California,
Central Division.
(Proceedings had in the United States Court of Appeals for the Ninth Circuit)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, February 5, 1957

Before: STEPHENS and BARNES, Circuit Judges, and CLARK, District Judge

Order of Submission

ORDERED appeal herein submitted to the Court for consideration and decision on briefs on file.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, May 8, 1957
Before: STEPHENS and BARNES, Circuit Judges,
CLARK, District Judge

Order Directing Filing of Opinion and Filing of Recording of Judgment

ORDERED that the typewritten per curiam opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

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[TITLE OF COURT AND CAUSE.]

May 8, 1957

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS and BARNES, Circuit Judges, and CHASE CLARK, District Judge

Per Curiam

This is a bankruptcy appeal. The sole question to be determined by this Court is whether the bankrupt was insolvent on or about September 16, 1953, the date a levy of attachment was issued out of the Municipal Court of the City of Los Angeles, State of California, as against certain real property belonging to the bankrupt. 11 U.S.C.A. §107 (a) (1).

Appellant denied that bankrupt was insolvent on the date of the attachment contending that the bankrupt had a chose in action valued at $81,719.61, as against the Seaboard Finance Company, based on an action filed September 15, 1953, against such finance company for usury.

The Referee found that the alleged claim for usury in the sum of $81,719.61 was inchoate and uncertain in character and amount and had no appreciable value

and concluded that the bankrupt was insolvent at the time the attachment in issue was levied.

Appellant argues that appellee failed to sustain the burden of proof of insolvency of the bankrupt on the date of the attachment. We disagree. Without the chose of action for usury the bankrupt was clearly insolvent on September 16, 1953. The suit as against the finance company sought treble damages and was still pending on December 28, 1955, when the hearing was held before the Referee. Mrs. Mahan, wife of the bankrupt, testified that she and her husband believed they had a good cause of action for usury against the finance company. The Referee stated that serious questions existed as to whether the finance company is subject to the Usury Act or is a personal loan company excluded therefrom, and also whether the amount claimed is the correct amount.

We have examined the briefs of the parties and the authorities cited therein, and hold that the finding of insolvency on the date in issue by the Referee was fully justified. The weight to be given to the claim for usury was properly within the discretion of the Referee. Based on the circumstances of this case, we find no abuse of that discretion.

Judgment affirmed.

(Endorsed:) Per Curiam Opinion. Filed May 8, 1957.

Paul P. O'Brien, Clerk.

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[TITLE OF COURT AND CAUSE.]

Judgment

Appeal from the United States District Court for the Southern District of California,

Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered: May 8, 1957

PAUL P. O'BRIEN, Clerk.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, June 17, 1957.
Before: STEPHENS and BARNES, Circuit Judges,
and CLARK, District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant, filed June 7, 1957, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

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[TITLE OF COURT AND CAUSE.]

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, to Record Certified Under Rule 21 of the Revised Rules of the Supreme Court of The United States

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-two (62) pages, numbered from and including 1, to and including 62, to be a full, true and correct copy of the entire record of the above-entitled cause in the said Court of Appeals, made pursuant to request of counsel for the Appellant, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this third day of July, 1957.

.....

PAUL P. O'BRIEN, Clerk.